

DEC 29 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JANETTE WANG, aka, AI Shuang Sung,

Defendant - Appellant.

No. 02-56768

D.C. No. CV-00-09519-TJH
CR-98-00455-RAP-02

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Argued and Submitted December 1, 2003
Pasadena, California

Before: PREGERSON, COWEN,** and W. FLETCHER, Circuit Judges.

Janette Wang appeals the district court's denial of her petition for habeas corpus under 28 U.S.C. § 2255. Wang claims that she was denied her Sixth

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Amendment right to effective assistance of counsel because her attorney misadvised her of the immigration consequences of her guilty plea. We reverse and remand to the district court with instructions to grant the writ of habeas corpus.

To establish ineffective assistance of counsel, a petitioner must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). "Gross mischaracterizations of the likely outcome of the plea, combined with erroneous advice on the possible effects of going to trial, falls below the level of competence required for a defense attorney." *Torrey v. Estelle*, 842 F.2d 234, 237 (9th Cir. 1988). *See also United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002) (Where defendant has been affirmatively misled by counsel about the immigration consequences of her criminal proceedings, counsel's performance may qualify as deficient under *Strickland*). To show prejudice in the context of a plea agreement, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Wang is a legal permanent resident. Her husband and children are all United States citizens residing in this country. In August of 1998, Wang pleaded

guilty to submitting false invoices and other documents to the United States Customs Service in violation of 18 U.S.C. § 542. She was sentenced to four months in a home detention program, to be followed by three years of supervised release. Because Wang's plea amounted to fraud in excess of \$10,000, her crime constituted an aggravated felony as a matter of law. 8 U.S.C. § 1101(a)(43)(M)(i). The consequences of conviction for an aggravated felony by a legal permanent resident are automatic removal and mandatory detention before and after removal proceedings, 8 U.S.C. §§ 1226(c)(1), 1227(a)(2)(iii), and 1231(a)(2). Since pleading guilty, Wang has remained in administrative detention awaiting a final order of removal to Taiwan.

Wang's attorney did not inform her of these immediate, virtually certain consequences of her plea. Instead, he explained to her that her plea could "adversely affect her ability to obtain U.S. citizenship and that she could even be deported." Wang's attorney further incorrectly advised her that there were no certainties regarding the consequences of her plea, asserting that "it was difficult to anticipate exactly what the INS would do and that there were no guarantees regarding her immigration status." In fact, it was virtually certain that the Government would immediately detain Wang and eventually remove her. Wang's

attorney thus misled Wang as to the consequences of her plea, and his performance was therefore deficient under *Strickland*.

Had Wang not been misled by her attorney there is a reasonable possibility that she would have gone to trial so as to avoid the sure consequences of removal and detention and the separation from her family resulting from the plea.

Alternatively, there is a reasonable possibility that Wang would have agreed to plead to a lesser charge that did not qualify as an aggravated felony. Wang's attorney's deficient performance therefore prejudiced her under *Strickland* and *Lockhart*.

Wang was denied her Sixth Amendment right to effective assistance of counsel when she pleaded guilty. Since Wang's present incarceration is premised on the validity of her conviction pursuant to her guilty plea, we reverse and remand to the district court with instructions to grant the writ of habeas corpus.

REVERSED and REMANDED.